Lee Boon Su v Maddahiri bin Gani

HIGH COURT (TAWAU) — SUIT NO T(22)-49 OF 2001
LINTON ALBERT JC
29 JULY 2004

Contract — Sale and purchase of land — Breach — Mode of payment — Full settlement of purchase price upon delivery and transfer of vehicle — Whether perfected by purchaser — Whether such failure tantamount to a breach of contract

The plaintiff and the defendant entered into a sale and purchase agreement for a piece of land. It was a term in the agreement that the plaintiff was to deliver and transfer a vehicle as full settlement of the purchase price. The defendant refused to deliver the draft title of the said land, contending that the plaintiff had failed to effect the transfer of the said vehicle. Before the court, the plaintiff sought, inter alia, specific performance of the sale and purchase agreement and damages.

Held, ordered accordingly:

(1) The plaintiff's case was based on his obligation to deliver and transfer the vehicle to the defendant and unless that was established, the purchase price of the said land was not fully settled, irrespective of the price tag placed on the vehicle (see para 5).

(2) The vehicle was owned by a third party, ie, one IGN Enterprise Sdn Bhd, who was a total stranger to the whole transaction. There was no evidence to show that IGN had agreed to deliver and transfer the vehicle to the defendant. The documentary evidence tendered by the plaintiff did not prove that the plaintiff has fulfilled his obligation of having transferred the vehicle (see paras 7 and 9).

(3) The plaintiff's claim for a decree of specific performance was dismissed and consequently so were the other claims as well (see para 11).

(4) There being no forfeiture clause in the said agreement, it was ordered that the defendant pay the plaintiff the sum of RM108,100 with interest thereon at the rate of 8% per annum from the date of judgment until full settlement. Each party would bear his own costs (see para 12).

[Bahasa Malaysia summary

Plaintif dan defendan telah membuat satu perjanjian jual beli untuk tanah berkenaan. Adalah satu terma dalam perjanjian tersebut bahawa plaintif harus memberi dan memindah milik sebuah kenderaan sebagai penyelesaian penuh harga beli. Defendan enggan menyerahkan hak milik draf tanah berkenaan, sambil mengadu bahawa plaintif gagal memindah milik kenderaan tersebut. Di hadapan mahkamah ini plaintif memohon untuk, antara lain, pelaksanaan spesifik perjanjian jual beli tersebut dan ganti rugi.

Diputuskan, memerintahkan seharusnya:

(1) Kes plaintif berasaskan obligasinya untuk memberi dan memindah milik kenderaan itu kepada defendan dan sehingga ini dibuktikan, harga beli tanah tersebut tidak disempurnakan, tidak tertakluk atas harga yang diletakkan pada kenderaan tersebut (lihat perenggan 5).

(2) Kenderaan itu dimiliki oleh pihak ketiga, iaitu IGN Enterprise Sdn Bhd, yang merupakan orang asing kepada transaksi itu. Tidak terdapat bukti yang menunjukkan bahawa IGN telah bersetuju untuk memberi dan memindah milik kenderaan itu kepada defendan. Keterangan dokumentar yang dimajukan oleh plaintif tidak membuktikan bahawa plaintif telah menyempurnakan obligasinya untuk memindah milik kenderaan tersebut (lihat perenggan 7 dan 9).

(3) Tuntutan plaintif untuk pelaksanaan spesifik ditolak dan dengan itu juga tuntutannya yang lain (lihat perenggan 11).

(4) Dengan ketiadaan klausa pelucuthakkan dalam perjanjian tersebut, defendan diperintahkan membayar plaintif RM108,100 dengan faedah pada kadar 8% setahun daripada tarikh penghakiman sehingga penyelesaian penuh. Setiap pihak akan membayar kosnya sendiri (lihat perenggan 12).]

Notes

For cases on contingent contracts, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 3619

Cases referred to

Foo Sam Ming v Archi Environ Partnership [2004] 1 MLJ 449 (refd)
Jaafar bin Shaari & Anor (suing as administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 (refd)
NVJ Menon v The Great Eastern Life Assurance Company Ltd [2004] 4 AMR 164 (refd)
Tindok Besar Estates Sdn Bhd v Tinjar Co [1979]2 MLJ 229 (refd)

Mirdin Mamdin (Chin, Mirdin & Co) for the plaintiff
Zakaria Ahmad (Rupilin Alik with him) (Zakaria, Japar & Partners) for the defendant

Linton Albert JC:

[1] The Defendant was a successful land applicant. The State Government of Sabah had offered to alienate to him 247 acres of land situated at Kalabakan, Tawau under PT95100569 (the said land). Before the draft title to the said land was issued, the Defendant agreed to sell the said land to the Plaintiff and on 19 August 1998 they entered into a Sale and Purchase Agreement ('the said agreement'). The terms and conditions of the said agreement were lopsidedly in favour of the Plaintiff, not least of which was the absence of a forfeiture clause. The purchase price and its payment by the Plaintiff to the Defendant is set out in Clause 3 of the said agreement which reads as follows:

The said purchase price of Ringgit Malaysia Three Hundred and Twenty One Thousand and One Hundred only (RM321,100) shall be paid by the purchaser to the Vendor in the following manner:

(a) Upon signing thereof, a sum of RM 15,000 of the purchase price, the receipt whereof the Vendor hereby acknowledges.

(b) The sum of RM64,220 payable 120 days from the date hereof.

(c) The balance sum of RM225,825, after deducting RM 16,055 as referred to in clause 12 to this agreement, shall be paid to the vendors upon issuance of the land title to the said Land from the Director of Lands and Survey Department.

[2] It is not disputed that clause 3 of the said agreement was varied to the extent that part of the purchase price was to be paid by the Plaintiff delivering and transferring to the Defendant one unit of a Toyota land cruiser wagon bearing registration number ST 7858 ('the vehicle'). There was, however, disagreement between the Plaintiff and the Defendant as to the value of the vehicle. The Plaintiff stated the value to be RM214,148, whereas the Defendant stated a much lower figure of RM164,148.18. Against the backdrop set out above, the Plaintiff claims that he had not only paid the Defendant the full purchase price for the said land but had in fact overpaid the Defendant by a significant sum of RM104,668.25. Such was the generosity of the Plaintiff, or so it seemed.

[3] The Plaintiff now alleges that the Defendant, in breach of an implied term of the said agreement, collected the draft title to the said land and refuses to hand it over to the Plaintiff despite demands and requests by the Plaintiff to do so. The Plaintiff, therefore, seeks (inter alia) a decree of specific performance of the said agreement, alternatively damages for breach of contract. He also seeks an additional relief for the repayment of the sum allegedly overpaid to the Defendant.

[4] The main thrust of the Defendant's defence was that the Plaintiff himself was in breach because he failed to transfer the vehicle to the Defendant. Learned counsel for the Defendant, Mr. Zakaria Ahmad in his written submission contended that the Plaintiff failed to comply with the terms of a letter dated 28 November, 1998 (Exhibit P9) from the Plaintiff to the Defendant which varied Clause 3 of the said agreement. For the sake of clarity it is reproduced verbatim.

Our Ref: LBS/011/007
25 November, 1998
Mr. Maddahiri bin Gani
H. 0083604
Tawau

Dear Maddahiri bin Gani

Toyota Land Cruiser Wagon
Chasis No.: HZJ80-0036506
Engine No: IHZ-0244417

As part of the payment to the acquisition of land from you Ref. L.S. 1001.1.1945/2 (PT. 95100569), I herewith forward the above vehicle under registration No. ST7858E to you as the beneficial owner. The value of the vehicle is agreed as follows:

	RM
Per invoice H 21982 of UMW	
Toyota Motor Sdn Bhd	164,148.00
Add financing cost	50,000.00
	RM 214,148.00

The vehicle is registered under my company, IGN Enterprise Sdn Bhd. Ownership will be transferred to you upon the full settlement of the hire purchase financing facility.

Kindly sign the duplicate of this letter as an indication of agreement and acceptance.

Yours faithfully,

Signed

Lee Boon Su

[5] It is clear, therefore, that the very foundation of the Plaintiff's case is his obligation to deliver and transfer the vehicle to the Defendant and unless that is established, it cannot be said that the Plaintiff has paid the full purchase price of the said land, irrespective of the price tag placed on the vehicle. Learned Counsel for the Plaintiff, Mr Mirdin Mamdin in his written submission contended that the numerous documents tendered by the Plaintiff at the trial go to show that the Plaintiff had fulfilled his obligation in Exhibit P9. Learned Counsel aptly cited the case of *Foo Sam Ming v Archi Environ Partnership* [2004] 1 MLJ 449 where Gopal Sri Ram JCA delivering the judgment of the Court of Appeal relied on and cited at p 453 the judgment of Chang Min Tat FJ in *Tindok Besar Estates Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229.

Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witness and their evidence. He purported to

> come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[6] In the light of the above authority, I would have no hesitation in rejecting the oral evidence of the Defendant (DW1) characterised as it was by denials and assertions of ignorance, but it is for the Plaintiff to prove his case and in order to succeed the Plaintiff's case must be presented with some precision. It does not augur well for the Plaintiff to simply deluge the court with allegedly relevant documents the contents of which are not only conflicting but are somewhat dubious in nature. It is certainly not for the court to cherry-pick matters favourable to the Plaintiff in these documents in order to make a finding in favour of the Plaintiff. Clearly, the Plaintiff cannot by oral evidence attempt to establish his case by contradicting the contents of the documents tendered by him. In *NVJ Menon v The Great Eastern Life Assurance Company Ltd* [2004] 4 AMR 164, Gopal Sri Ram JCA, at p 173 had this to say:

> In the instant case, the learned judge referred to the oral testimony and relied upon it for the interpretation of the agreements and circulars. That, in our view is clearly an inadmissible method of construction.

[7] Hence it is futile for the Plaintiff to assert in his oral testimony that he had given the vehicle to the Defendant as part payment for the purchase price of the said land. This is precisely what the Court is faced with here. In the first place Exhibit P9 is in itself inherently at odds with the obligation of the Plaintiff to transfer the vehicle to the Defendant when the vehicle is owned by a third party who is a total stranger to the whole transaction. There is not a shred of evidence to show that the owner of the vehicle, one IGN Enterprise Sdn Bhd (the company) had agreed to deliver and transfer the vehicle to the Defendant. Exhibit P2 is a letter from the Defendant to the company dated 21 November, strangely giving his 'voluntary consent' to the company to sell the vehicle and instructing the company to pay the Plaintiff a sum of RM60,131 out of the proceeds of sale. Exhibit P3 is a letter dated 19 November 2000 co-signed by both the Defendant and the Plaintiff to the effect that the purchase price of the said land was RM348,187 out of which RM318,187 had already been received by the Defendant. Exhibit P4 is a letter from the Defendant to the Company dated 19 November 2000 relinquishing all his rights to the vehicle, authorising the company to sell it, receive the proceeds and forward the proceeds to the Plaintiff. Exhibit P10 is a document co-signed by the Plaintiff and the Defendant dated 20 November 1998 where the Defendant acknowledged receiving the vehicle. Exhibit P12 is a statutory declaration dated 6 January 2000 where at paragraph (2) the Defendant deposed as follows:

(2) Saya mengaku bahawa sehingga 06.01.2000 saya telah menerima wang tunai dan cek daripada En Lee Boon Su sebanyak RM318,187.

[8] P13 is a statutory Declaration by the Defendant dated 6 January 2000 where he deposed at paragraph (2) as follows:

> Janji saya kepada En Lee Boon Su ialah, jika saya gagal menunaikan janji mendapatkan Letter of Offer pada 20.11.2000, maka saya mengaku bayar balik RM60,131 kepadanya. Jika saya tidak berdaya upaya maka saya bersetuju dengan rela hati, sebuah kereta ST7858E Toyota Ninja 100 kepunyaan saya sungguhpun didaftarkan atas nama IGN Enterprise Sdn Bhd (97312A) itu digadaikan kepada Endk Lee Boon Su untuk dilelong menurut harga pasaran daripada 3 Syarikat Kereta, dan apa sahaja yang tertinggal diserahkan kepada saya.

[9] Surely, regardless of how each of those documents, or all of them taken together, are interpreted, they cannot be said to even remotely constitute proof that the Plaintiff has fulfilled his obligation to deliver and transfer the vehicle to the Defendant. Accordingly, it is my finding that the Plaintiff is in breach of the said agreement as varied by exhibit P9. In arriving at my finding, I am conscious of the fact that the documents set out above are from the agreed bundle and bearing in mind also what was said by Peh Swee Chin FCJ in *Jaafar bin Shaari & Anor (suing as administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 706.

> Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.
>
> Thirdly, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.
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> Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, inter alia, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg either great or no weight to be given to any part of any document is also a matter for the trial Court, which considers the documents including any 'written hearsay' contained therein, The Court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate Court for reasons for such refusal.

[10] In the Privy Counsel case of *Australian Hardwoods Pty Ltd v Commissioner for Railways* [1961] 1 ALL ER 737 at p 742 Lord Radcliffe had this to say:

> A Plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations.

[11] In the light of my finding, I have no hesitation in dismissing the Plaintiff's claim for a decree of specific performance and it follows that the claim for damages, repayment of money overpaid to the Defendant and consequential declaratory orders must accordingly be dismissed.

[12] The Defendant would, in my view be unjustly enriched if no order is made as to the sum of RM108,100 the Defendant admitted to have received from the Plaintiff. There being no forfeiture clause in the said agreement and the Defendant having stated that he is ready and willing to return the said sum, I therefore order that the Defendant do pay the Plaintiff the sum of RM 108,100 with interest thereon at the rate of 8% per annum from the date of judgment until full settlement Each party shall bear his own costs. Order accordingly.

Ordered accordingly.

Reported by AG Kalidas